Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HUBERT CALL and RUTH CALL,
Petitioners,

v.

City of Albany, California; Interstate General Corporation; Interstate General Development, Inc.; Interstate Albany Corporation; Cebert Properties, Inc.; BRUCE THOMSON, ROBERT SCHARF, DARIO C. MENIKETTI, LOUIS H. BELL, JERRY J. LEAHY, THELMA RUBIN, BLANCHE VRANNA, ROBERT B. ELLIOTT, and CATHERINE J. WEBB, residents and taxpayers of the City of Albany, California,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR CERTIORARI

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ORDER DUE
August 21, 1985

ORDER DENYING REHEARING

S.F. No. 24693

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

THOMPSON ET AL., *Appellants*

v.

CALL ET AL., *Appellants;*
CITY OF ALBANY ET AL., *Respondents*

Opinion modified.

Appellants Call et al. petition for rehearing DENIED.

SUPREME COURT
FILED
Jul 29 1985
LAURENCE P. GILL, Clerk

/s/ BIRD
Chief Justice

Bruce THOMPSON et al., Plaintiffs and Appellants,

v.

Hubert CALL and Ruth Call, Defendants and Appellants;

The City of Albany, a municipal corporation; Interstate General Corporation; Interstate General Development, Inc.; Interstate Albany Corporation; and Cebert Properties, Inc., Defendants and Respondents.

A011653.
Civ. 44375.

Court of Appeal, First District, Division 4.

Nov. 16, 1983.

As Modified on Denial of Rehearing Dec. 15, 1983.

Hearing Granted Feb. 16, 1984.

RATTIGAN, Associate Justice.

Plaintiffs in this action are residents of defendant City of Albany (City). They commenced the action as a taxpayers' suit, challenging the validity of a transaction in which defendant Cebert Properties, Inc., a corporation, bought a parcel of land from defendants Hubert F. Call (Call) and Ruth L. Call, his wife, paid them $258,000 for it, and conveyed the parcel to the City, while Call was a member of the City Council.

The defendants named in the complaint included the City; the Calls; the individuals who served with Call as members of the City Council at pertinent times; Cebert Properties, Inc.; and three other corporations. After a nonjury trial, the court found and concluded that the Calls were liable to the City for the $258,000 they had received for the land, plus interest; that

the City was nevertheless to retain title to the land; and that relief was to be denied as to the other defendants.

A judgment was entered accordingly. The Calls appeal from the judgment insofar as it holds them liable to the City for the $258,000 plus interest. Plaintiffs appeal from it insofar as it denies relief as to the corporate defendants.

THE PARTIES

Plaintiffs were taxpaying residents of the City at pertinent times. The trial court found, and it is undisputed, that they had standing to maintain the action. The members of the City Council named as defendants were Call, Joseph Carlevaro, Richard Clark, George C. Hein, and Lewis M. Howell. Call, Carlevaro, Hein, and Howell (all of whom appeared in the action) were members of the City Council during 1972 and 1973.[1]

The corporate defendants named in the action were Interstate General Corporation (IGC); Interstate General Development, Inc. (IGD); Interstate Albany Corporation (IAC); and the aforementioned Cebert Properties, Inc. (Cebert). The trial court found, and it is also undisputed, that the corporate defendants were essentially interchangeable for purposes of the challenged transaction.[2] Jack Krystal, a real estate broker, was

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[1] The record does not show an appearance in the action by defendant Clark, who was also sued as a member of the City Council. It also does not show a disposition of the action as to him. Plaintiffs state on their appeal that he was "granted summary judgment prior to trial."

[2] The court found in pertinent part as follows: "Defendant IAC was at all times relevant and is a subsidiary of IGD. IGD was at all times relevant and is a subsidiary of IGC. The stock of Cebert was at all relevant times and is owned by James J. Wilson. . . . James J. Wilson was at all times relevant and is the president of IGC, IGD and IAC, and was and is a director of IGC, IGD, IAC and Cebert. For all relevant matters, IGC, IGD, IAC and Cebert, and each of them, acted as agents and servants for each other, and had unity of purpose and concurrence of action."

also named as a defendant.

THE ACTION

In each of several causes of action stated in their complaint, plaintiffs alleged that each of the corporate defendants was in effect the alter ego of the others, and that at pertinent times each had acted as the agent of the others and of the City. As pertinent to the appeals, plaintiffs further alleged a factual sequence which included these details:

In 1972, IGC applied to the City for a use permit authorizing the construction of a "condominium project" on land owned by IGC and located within the boundaries of the City. On November 13, 1972, the City Council (1) voted to grant the use permit on condition that IGC donate to the City a parcel of land to be known as "Overlook Park"; and (2) voted to accept IGC's offer of a so-called "$600,000 plan" in which IGC agreed "to donate additional land for . . . 'Overlook Park' as might be acquired by IGC through private negotiations for the sum of $600,000. . . ."

In 1973, acting "by and through defendant Cebert" in the performance of the $600,000 plan, IGC purchased a parcel of land from the Calls for $258,000. Cebert conveyed the parcel to the City. On August 21, 1973, the City Council accepted the conveyance from Cebert and "purportedly ratified" it. On August 27, 1973, the City issued an "initial building permit" authorizing construction of the project pursuant to the use permit granted to IGC in 1972.

Plaintiffs further alleged: "The transaction by which defendant IGC, acting through . . . Cebert," purchased the parcel from the Calls and conveyed it to the City, was "a prohibited transaction under Sections 1090 et seq. of the . . . Government Code . . . ."[3] As pertinent here, they also alleged that "such

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[3] Statutory citations in this opinion are to the Government Code except where expressly indicated otherwise. Section 1090 provides in

transaction, including all contracts of purchase and sale executed pursuant thereto, and all permits . . . issued as a condition, or in consequence, of such transaction, were . . . null and void and of no effect."

With these and related allegations, plaintiffs stated a total of eleven causes of action in separate counts. By their numbers, they first stated causes of action for the recovery of the $258,000 by the City, from the other defendants, on the respective grounds (1) that the entire transaction was void because of the violation of section 1090 alleged, and (2) that it included a "contract" which was void for the same reason. Plaintiffs next stated causes of action for accountings and the recovery by the City of actual "damages" (3) from Call, (4) and (5) from the other members of the City Council, and (6) from the corporate defendants and Krystal, for breaches of specified "fiduciary" duties the several defendants were respectively alleged to have owed the City.

Plaintiffs also stated causes of action for the recovery of actual "damages" by the City, from the other defendants, for (7) their alleged "constructive fraud" and (8) "conspiracy" in the transaction; (9) for the recovery of punitive damages by the City from the other defendants; (10) for injunctive relief restraining construction of IGC's project pursuant to the use permit and the building permit, and the further expenditure of public funds, on the basis that the transaction and the permits were void; and (11) for a declaratory judgment to the effects that the transaction and the permits were void.

Answers were filed by the four corporate defendants, appearing jointly, and by defendant Ruth L. Call. A joint

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pertinent part:

"1090. Members of the Legislature, state, county, district, and *city officers or employees* shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. . . ." (Italics added.)

answer was also filed by the City and Councilmen Call, Carlevaro, Hein, and Howell.

THE EVIDENCE

The evidence includes more than 100 documentary exhibits and extensive testimony by 17 witnesses. Despite its volume, the contentions on appeal require that it be summarized in close chronological detail. It supports the following recitals:

Albany Hill is a steep promontory in the westerly portion of the City. Its summit commands a panoramic view of the City and San Francisco Bay. In and before 1972, IGC owned 36 acres of land at the westerly base and on the adjacent slope of the hill. That side of the hill, and the summit, were undeveloped in 1972. The land at the summit consisted of four contiguous parcels. One of them was a 1.1-acre parcel owned by the Calls as joint tenants. The others were a 2-acre parcel which was the uppermost part of the 36 acres owned by IGC; a 2.2-acre parcel owned by Albany Hill Associates, a partnership; and a 2-acre parcel owned by Golden Gate Hill Development Company, a corporation.

In 1972, all of the lands described were in a hill control ("HC") district established by the City's zoning ordinance. Another ordinance provided that no building permit for the erection of any structure on land in the HC district could be issued unless a use permit had first been obtained from the City Council. IGC's 36 acres and Golden Gate Hill Development Company's continguous parcel were zoned "R1HC" (for single-family dwellings). The Calls' and Albany Hill Associates' parcels were zoned "R3HC" (for high-rise, high-density residential units).

By April of 1972, IGC had formed plans to construct and develop a 2,500-unit, high-rise residential complex on its 36-acre parcel. A representative of IGC approached James Turner, the City's administrative officer, concerning the steps necessary to obtain City approval of the project. IGC was informed at that time that the City desired to maintain as much

open space as possible on Albany Hill. In July of 1972, IGC applied to the City Council for a use permit authorizing the project. The application included a request by IGC for action by the Council rezoning the 36-acre parcel from R1HC to R3HC.

In August, 1972, the City's Parks and Recreation Commission proposed to the City Council that a site for a municipal park be acquired at the summit of Albany Hill. This site later became known as "Overlook Park." At a meeting conducted on August 28, 1972, the Council voted to "go on record as generally concurring" with the park proposal. Call was present as a member of the Council. He did not participate in the discussion of the proposal, and he abstained from the vote.

The City Council and the City Planning Commission conducted public hearings concerning the project proposed by IGC. There was general enthusiasm for it because of the prospect that it would significantly increase the City's property tax base. Members of the Council repeatedly expressed the view that the pending use permit should be subject to a condition requiring IGC to dedicate land on Albany Hill for use as parks and permanent open space.

In a communication to IGC in October, 1972, Turner and the city attorney proposed certain conditions to be included in the use permit. One of the conditions would have required IGC to dedicate to the City its 2-acre parcel at the summit of Albany Hill, for use as part of Overlook Park, and a 4-acre parcel ("Creekside Park") owned by IGC and located at the northerly base of the hill.

In a letter written to the City Council on November 3, 1972, IGC rejected the proposed condition requiring dedication of the two park sites. In the same letter, IGC also proposed the so-called "$600,000 plan." The plan would require IGC to "allocate" $600,000 of its own money for the acquisition of land for Overlook Park; to spend that sum, or less, for the acquisition of such land by IGC, through "private negotiation," as it selected; to convey any land so acquired to the City, for use as part of the

park; and to pay to the City any unexpended balance of the $600,000 for use in "condemning by eminent domain" any land required for the park but not acquired from IGC pursuant to the $600,000 plan. The express language in which IGC proposed the plan in its letter dated November 3, 1972, is quoted in the margin.[4]

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[4] IGC commenced the letter by referring to "our application to develop our property in Albany" (i.e., to its pending application for a use permit and rezoning). IGC then stated its intent "to make a major effort to save and preserve the Albany Hill top for public use. . . ." The letter continued:

"*Should our application be granted*, we agree to allocate $600,000.00 to acquire such of the real property as may be available, first by private negotiation at what we, in our judgment, regard to be reasonable prices, at the hilltop area of Albany Hill, within the boundary line designated by the City . . . [as] . . . Overlook Park. [¶] While this property is not subject to any public use by the City and has not been heretofore the subject of any litigation in eminent domain for acquisition by the City, the developer is agreeable to providing the City, not as a consideration or a condition of the zoning application, but in the general overall public interest, with no countervailing advantage to the developer, *concurrent with the issuance of the first construction permit*, by deed to the City, as a gift, such of the real property as it has been able to acquire for the $600,000.00 that the City is agreeable to using as a gift for the sole purpose of being a permanent park and open space for the City. . . .

"This land, together with the acreage that we will be dedicating . . . , will provide the City of Albany and its citizens with a unique, superb and useful view park for the public enjoyment and open space. If, in our negotiations, we are unsuccessful in concluding purchase arrangements with the private landowners who own real property within the area of the proposed park, we reverse the right to pay over to the City of Albany all unexpended funds, as a gift and not as a consideration of any zoning application, from the $600,000.00 so that the City may use these funds solely for condemning by eminent domain all of the lands that the City requires for this Albany Hill Overlook Park only." (Italics added.)

Another proposal by the City was communicated to IGC in a letter written by Turner and the city attorney on November 10, 1972. They again suggested a condition of the use permit which would require IGC to convey its 2-acre and 4-acre parcels to the City for use as parks. They also requested that IGC "reiterate" its offer of the $600,000 plan as stated in its letter dated November 3, 1972.

In a letter to the City Council dated November 12, 1972, IGC stated that it was thereby "submitting in final form" the conditions it would accept in the use permit. IGC also stated: "We are prepared to make a gift of either of the two park sites to the City . . ., but not both of them, and we hereby reiterate our offer contained in our letter of November 3, 1972, to allocate $600,000.00 for the purpose of first purchasing additional private property to encompass the proposed Overlook Park of Albany Hill, all at or above the 200′ contour of the hill, and for the Albany Hill Overlook Park only, and to donate, in addition," its (IGC's) 2-acre parcel at the summit of the hill. The only land not owned by IGC at or above the 200-foot "contour" (i.e., elevation) of Albany Hill consisted of the contiguous parcels owned by the Calls, Albany Hill Associates, and Golden Gate Hill Development Company.

The formulation and purpose of the $600,000 plan were explained in testimony by James J. Wilson, who was the president or a director (or both) of each of the four corporate defendants. (See fn. 2, *ante*.) Wilson was in charge of IGC's proposed project from its inception. He described himself as the "architect" of the $600,000 plan. He testified that as early as 1971 he had resolved to purchase the land at the summit of Albany Hill, or to have it dedicated to the City for use as a park, in order to eliminate the possibility of a high-rise development uphill from the project proposed by IGC. Wilson had in mind that high-rise units above IGC's project would seriously compromise the privacy (and consequently the value) of the units they would overlook.

Because the parcel owned by Golden Gate Hill Development Company parcel was not zoned for high-rise units, Wilson was

primarily concerned with the parcels owned by the Calls and Albany Hill Associates. He was willing to spend up to $1,000,000 to acquire these two parcels because of their "nuisance" potential. He hoped to acquire them for less, through the $600,000 plan, by using the threat of their condemnation by the City as a weapon in negotiations. He testified that "in effect, we were holding a club over the heads of these . . . people."

The City Council acted on IGC's application at a meeting conducted on November 13, 1972. In the first of three successive votes, the Council amended the City's zoning ordinance to rezone IGC's 36-acre parcel from R1HC (single-family dwellings) to R3HC (high-density, high-rise residential units). The Council next voted to grant use permit No. 20 to IGC on specified conditions. One of the conditions required IGC, "concurrent with the issuance of the first construction permit" for the project, to convey its 2-acre parcel at the summit of Albany Hill to the City "for the sole purpose of being a permanent park and open space for the City."

The $600,000 plan was not mentioned among the conditions of use permit No. 20 as granted. The plan was reached in the third action taken by the City Council, when a majority voted that "the City . . . accept the offer of . . . [IGC] . . . of [*sic*] their letters of November 3, and November 12, for allocation of $600,000.00 for the purpose of purchase of additional private property to encompass the proposed Overlook Park of Albany Hill."

Call was present at this meeting. He voted to rezone IGC's property, and to grant use permit No. 20. He abstained from the vote that the City "accept the offer" of IGC relative to the $600,000 plan.

Shortly after the meeting, IGC placed Eugene Hill in charge of proceeding with the project under Wilson's supervision. In discussions with Turner, it was made clear to Hill that the first building permit would not be issued until land had been acquired pursuant to the $600,000 plan. When this was

reported to Wilson, he instructed Hill to obtain appraisals of the hilltop parcels owned by the Calls, Golden Gate Hill Development Company, and Albany Hill Associates.

Hill retained Elliott Balol, a land appraiser, for this purpose. Ball appraised the Calls' 1.1-acre parcel at $63,800; the upper portion of Golden Gate Hill Development Company's parcel at $31,900 per acre; and Albany Hill Associates' 2-acre parcel at $211,700. Wilson instructed Hill to offer these amounts to the respective owners. Hill communicated offers to the owners of the three parcels in letters written on IGC's behalf in March of 1973.

In response to IGC's offer of $63,800 for the Call's parcel, Call wrote a letter to Hill describing recent sales of "comparable zoned properties" in the City. Call also stated: "While we have no interest in selling at this time, we would be agreeable to having the property go into a park for the City of Albany. From the comparables listed above, our property is clearly worth $360,000. . . . [¶] In view of above mentioned, your offer is unacceptable. I would be willing to meet and negotiate."

None of the IGC's offers was accepted. Wilson told Hill to have someone else negotiate with the owners. Hill selected defendant real estate broker Jack Krystal and authorized him in a letter to negotiate for the acquisition of the three parcels by IGC. Hill stated in the letter that any real estate commissions involved were to be paid by the sellers. At or about the same time, he informed Krystal of the offers which had previously been made for the parcels.

Krystal offered Golden Gate Hill Development Company $40,000 for its 2-acre parcel. He was informed in effect that a sale of the parcel was not possible at the time, and he abandoned negotiations for its acquisition. He offered Albany Hill Associates $211,700 (Ball's figure) for its 2.2-acre parcel. The partners in Albany Hill Associates were Wallace D. Runswick and Jordan Rust. In subsequent negotiations with Krystal, they agreed to sell the parcel to IGC for $340,000. Runswick testified in effect that he thought the parcel was worth substan-

tially more, but that he agreed to sell it for $340,000 because he recognized a threat that the City would otherwise take it by eminent domain at greater expense to himself and Rust.

Krystal commenced negotiations with the Calls by offering them $180,000 for their 1.1-acre parcel. Call eventually agreed to sell it to IGC for $258,000. At all times while he was negotiating with Krystal, Call knew that IGC was acquiring the parcel for conveyance to the City pursuant to the $600,000 plan.

In June of 1973, Krystal prepared and presented written contracts for the sales by the Calls and Albany Hill Associates. Each contract was on a standard printed form entitled "Real Estate Purchase Contract and Receipt for Deposit." In the contract presented to the Calls, IGC offered to buy their 1.1-acre parcel for $258,000. Hill signed the offer, which was for title to the parcel "free of liens, encumbrances, easements, . . . and conditions of record . . . other than exceptions of record" shown in a preliminary title report attached to the contract. IGC also stated in the offer that "closing of this transaction . . . is conditioned upon purchaser being issued all necessary permits to a project [sic] located adjacent to this property."

The Calls accepted the offer by signing the contract on June 29, 1973. At about the same time, Runswick signed a similar contract in which Albany Hill Associates agreed to sell the 2.2-acre parcel to IGC for $340,000.

Written escrow instructions for the two sales were executed and delivered to an escrow holder in August of 1973. IAC delivered buyer's instructions with which it deposited in escrow an application for the first-phase building permit; the sum of $600,000 (the full amount "allocated" for the acquisition of land in the $600,000 plan); and the further sum of $68,012.35, which was the total of fees and charges payable to the City upon issuance of the building permit. IAC instructed the escrow holder to comply with the sellers' instructions "regarding acquisition of land," to pay "any remaining surplus balance" of the $600,000 to the City, and to pay the $68,012.35 to the City,

upon the receipt in escrow of a building permit issued by the City pursuant to the application.

IGC designated Cebert as the actual buyer of the two parcels from Albany Hill Associates and the Calls. With instructions signed by Runswick and Rust, Albany Hill Associates deposited in escrow a grant deed conveying its 2.2-acre parcel to Cebert. The escrow holder was instructed to deliver the deed when it held for the seller's account "the sales price of $340,000 less deductions" to be paid out as shown on an itemized list. The "deductions" included $12,000 to be paid to Krystal as a real estate commission.

The Calls deposited two grant deeds in escrow with their instructions. They instructed the escrow holder to deliver both deeds when it held for their account "the sales price of $258,000 less deductions" itemized by them. The "deductions" included $5,000 to be paid to Krystal as a real estate commission.

One of the deeds deposited in escrow by the Calls was a grant deed whereby they conveyed the 1.1-acre parcel to Cebert. The other was a grant deed whereby they conveyed to the Albany Lions Club "an easement" on the parcel "for ingress and egress to maintain the existing cross standing on a portion" of the parcel. This "cross" was variously described in the evidence as a "large monumental cross" and a "Christian type cross." The Calls had permitted the Albany Lions Club to erect it on the 1.1-acre parcel in 1971. It was made of steel, stood 15 to 20 feet high, and was firmly anchored in a permanent base. By reason of its location at the summit of Albany Hill, the cross could be seen from all areas of the City. It was illuminated at night during the Christmas and Easter seasons.

Because the easement on the parcel was newly established by the Calls, it was not an "exception of record" to their title within the meaning of their written contract for the sale of the parcel to IGC. Asked about its establishment in the escrow, Krystal testifed that Call had "insisted prior to closing of the transaction . . . that IGC agree to placing a permanent easement and access to the cross for the benefit of the Lions Club."

Krystal also testified that Hill agreed to the easement. Call testified that he told Krystal he would sign the written contract for the sale of the parcel "'on one condition, . . . that the cross will remain there permanently and an easement over the property to the cross is granted.'"

Wilson testified that Hill told him that Call had added the easement condition "during the negotiation of the contract." Wilson would not have been willing to pay as much for the 'Calls' parcel, with the "easement on it," because if Call "had the right to keep that cross where it was, it would have affected the value of the property." However, Wilson further testified that he was indifferent to the creation of the easement in any event: "Once we started our project, it didn't make any difference at all where the cross was located or whatever else happened. it was then the problem of the City, because it was their land." Wilson did not object to Call's demand that the 1.1-acre parcel be burdened with the easement before it was conveyed to Cebert (and by Cebert to the City).

Cebert deposited in the escrow a grant deed dated August 17, 1973, whereby it would convey title to both parcels to the City. The deed did not show that title to the Calls' 1.1-acre parcel was to be conveyed subject to an easement held in connection with the cross. Acceptance of the deed by the City Council, prior to its recordation, was required by statute. (See § 27281.) In addition, a lending institution which was to finance the construction of IGC's project had requested action by the City Council "ratifying" the land acquisitions being made pursuant to the $600,000 plan.

Action on these matters was taken at a meeting of the City Council conducted on August 21, 1973. The Council first adopted resolution No. 73-66, by which it approved a tentative map of IGC's project. Call voted for resolution No. 73-66. The Council next adopted resolution No. 73-76, in which it stated that the "Grant Deed from Cebert . . . to the City of Albany . . . as Grantee, dated August 17, 1973, be, and the same is hereby accepted. . . ." The Council then adopted the "ratify-

ing" resolution (No. 73-78), in which it stated in pertinent part that it did "approve and ratify the purchases of the certain real properties . . . described in that Grand Deed referred to in Resolution No. 73-76." Call abstained from voting on resolutions 73-76 and 73-78.

This meeting was preceded by a work session at which only Turner, the city attorney, and Councilman Howell (who was the mayor) were present. Turner and the city attorney informed Howell of the details of the purchases of the Calls' and Albany Hill Associates' parcels by IGC, and of the conveyance of the parcels to the City by Cebert, which were subject to ratification and acceptance by the City Council at the forthcoming meeting. They also told Howell that the Council was meeting to consider acceptance of the parcels and to determine that the prices paid for them by IGC were reasonable. Howell was advised to have Turner explain these matters, at the meeting, for the information of the other members of the Council and the public.

At the formal meeting, Turner was not asked to give this explanation and none was given. He stated in a memorandum of the meeting that "the only basic information available to the Council in determining value, was to the extent that only $2,000.00 was left from the acquisition of the 3.2 acres out of a total of $600,000.00." Testimony by Councilman Howell supported inferences that he generally understood the details of the $600,000 plan and of the actions taken by the City Council at the meeting. Testimony by Councilmen Carlevaro and Hein fairly showed that they were not informed of these details and did not understand them. Call testified that when he learned of the deeds, at the meeting, he "asked, 'Was the cross and all recorded in that,' and it was." There was no evidence that the other members of the Council were informed that the Calls' 1.1-acre parcel was being accepted by the City subject to the easement to be held in connection with the cross.

On August 23, 1973, the City deposited the required building permit in escrow with instructions signed by Turner and the

city attorney. They instructed the escrow holder to deliver the permit when it held for the City the amount of $68,012.35 "and the further sum of $2,000.00, which represents the unexpended sums for the purchase of the properties. . . ." They explained in the instructions that "a total sum of $598,000.00 was expended for the purchase of the properties, which leaves a balance of $2,000.00 of the original $600,000.00 agreement [*sic*]." The building permit deposited in escrow was "conditioned" in part on the "requirements" of the $600,000 plan.

The escrow closed on August 24, 1973, pursuant to the parties' instructions. Albany Hill Associates' deed conveying the 2.2-acre parcel to Cebert was recorded. The Calls' deed granting an easement on their 1.1-acre parcel to the Albany Lions Club was recorded ahead of their deed conveying the parcel to Cebert. The deed by Cebert conveying both parcels to the City was recorded last. The City thus acquired the Calls' parcel subject to the easement held by the Lions Club. The building permit authorizing the commencement of construction of IGC's project was delivered from the escrow. Large-scale construction of the project was started shortly afterward.

Detailed and conflicting evidence was received as to the fair market value of the Calls' 1.1-acre parcel in 1973. Elliott Ball, who appraised it for IGC, fixed its value at $63,800 as of February 18, 1973. G. Michael Yovino-Young, an appraiser called by plaintiffs, testified that the value of the parcel was $100,000 in March of 1973. John R. Barton, an appraiser who testified for the Calls, fixed its value in August, 1973, at $450,000. These appraisers arrived at their respective figures on the bases that the highest and best use of the 1.1-acre parcel was for the high-density residential construction which its R3HC zoning permitted. Ball's figure of $63,800 was based on his estimate that the parcel would accommodate 22 units evaluated at $2,900 per unit for appraisal purposes. Yovino-Young's figure of $100,000 was based on an estimate of 35 units evaluated at approximately $3,000 per unit. Barton's figure of $450,000 was based on 90 units at $5,000 per unit.

Wilson testified that he disagreed with Ball's opinion that only 22 units could be constructed on the parcel, and that his (Wilson's) calculation of the total $600,000 figure was based in part on his estimate that the parcel would accommodate 90 units evaluated at $3,000 per unit. A real estate broker testified that a client of hers had offered Call $450,000 for the parcel in 1973, and that this figure was based on 90 units at $5,000 per unit.

The Calls had acquired the parcel in 1970. The price they had paid for it was much lower than any of the appraisers' evaluations, but there was evidence that the pendency and size of IGC' project had substantially increased the market value of the parcel and nearby property in 1972 and 1973. On the other hand, testimony by several witnesses supported an inference that the value of the parcel had been severely diminished by the location of the "monumental cross" on it, and by the easement granted to the Albany Lions Club, because they would prevent or limit the construction of high-rise, high-density residential units on the parcel consistent with its highest and best use and its zoning. There was no evidence of its diminished value as such.

During the trial, plaintiffs dismissed the action with prejudice as to defendant real estate broker Jack Krystal. At the close of plaintiffs' case, Councilmen Carlevaro, Hein, and Howell moved for judgment in their favor pursuant to Code of Civil Procedure section 631.8. The motion was granted.

POST-TRIAL PROCEEDINGS

The trial court filed a memorandum decision in which it reviewed the evidence in detail and stated its determinations (among others) that the transaction shown had produced a "single contract" which was void for violation of section 1090 because Call, a member of the City Council, had a "proscribed financial interest" in it; that the remedy to be applied called for the retention by the City of the parcel of land sold by the Calls for $258,000; that it also required a "forfeiture" of the $258,000

by the Calls to the City; and that the other defendants were not to be held liable to the City in any respect.

The Calls thereupon moved for leave to amend their answer to conform to the proof. They proposed amendments whereby they would plead affirmative defenses based on allegations that the City was "estopped from profiting" at their expense because throughout the disputed transaction they had acted on the advice of the city attorney in specified respects. The motion was denied.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial court signed and filed elaborate findings and conclusions which must be summarized and quoted at length. The court first made more than 40 findings in which the events shown in the evidence were recited in exhaustive chronological detail. The court then found that there had been a "single agreement" between IGC and the City; that the "terms and conditions" of the agreement" were "reflected" in specified documentary sources and actions taken by the City Council; and that "Call had a financial interest in said agreement." The court concluded from these findings that Call's financial interest was an "interest proscribed" by section 1090; that by reason of the "proscribed financial interest" the Calls were indebted to the City in the full amount of the $258,000 they had received for the land, plus interest on it from August 21, 1973; that they were not entitled to return of the parcel; and that title to it would remain in the City.[5]

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[5] These findings and conclusions are quoted in their contexts, and in pertinent part, as follows:

"Findings Of Fact

". . . .

"44. The purchases of real property by IGC through Cebert, and the conveyances of said real property to the City were in performance of a single agreement entered into between IGC and the City, the terms and conditions of which are reflected in IGC's letters of

The court also made findings in which it recited the facts relative to the existence and use of the "monumental cross" on the Calls' parcel; that their contract for the sale of the parcel to IGC was "silent concerning the cross," but that Call had "insis-

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November 3, 1972 and November 12, 1972, the relevant resolutions adopted by the Council concerning the Use Permit, the $600,000 Plan, the acceptance of deeds [*sic*] from Cebert and the ratification of purchases made by IGC or Cebert of real property for conveyance to the City, the Use Permit, the Building Permit, the Real Estate Purchase Contracts and Receipts for Deposit concerning the Call Parcel and the Albany Hill Associates Parcel, and the escrow instructions. . . . Call had a financial interest in said agreement.

". . . .

"Conclusions Of Law

". . . .

"3. Call's financial interest in the agreement as set forth in Finding of Fact No. 44 between IGC and the City was an interest proscribed by . . . [Government Code section] . . . 1090, which provides that 'City officers of employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.'

". . . .

".5. Because of the proscribed financial interest in the agreement between IGC and the City, pursuant to which Ruth and Hubert Call received $258,000 for the Call Parcel, and because the Call Parcel was owned by Ruth and Hubert Call jointly, and sold and conveyed by them jointly, Ruth and Hubert Call are indebted to the City in the full amount received by them in the performance of the agreement, which amount is $258,000. Furthermore, because said liability is for a liquidated amount, received by Ruth and Hubert Call pursuant to specific action of the City on a specific date, Ruth and Hubert Call are liable to the City for interest on the $258,000 at the rate of 7% per annum from August 21, 1973 until paid in full. Finally, because the agreement under which Ruth and Hubert Call received the aforementioned monies was prohibited by statute, specifically . . . [section] . . . 1090, Ruth and Hubert Call are not entitled to a return of their property given in consideration for said agreement, and title to the Call Parcel remains and shall remain in the City of Albany."

ted" that the parcel "be burdened with an easement for the maintenance of the cross, and IGC offered no objection"; and that the cross was standing on the parcel when the City Council accepted the deed from Cebert on August 21, 1973, and when the City "took title" to the parcel. In finding No. 51, the court stated that the City's acceptance of the deed "had a secular purpose," in that the parcel was accepted "for use by the public as a park." In conclusions of law Nos. 13 through 15, the court determined that the City's acceptance of the parcel "neither advanced nor inhibited religion," and that it "did not constitute excessive governmental entanglement with religion" or "action in violation of the First Amendment to the United States Constitution."

In other findings and conclusions made in response to specific causes of action stated in the complaint, the court determined that the defendants other than the Calls were not liable to the City and that there had been no "conspiracy" or "fraud" in the transaction.[6] Addressing the cause of action for

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[6] These findings and conclusions are also quoted in their contexts, as follows:

"Findings Of Fact

". . . .

".52. IGC, IAC, IGD and Cebert breached no duties owed to the City of Albany, complied with all conditions imposed upon it [*sic*] by the City of Albany, and performed all obligations owed by it to the City of Albany, in the issues raised by the pleadings in the subject litigation.

".53. No defendant in the subject litigation was involved in a conspiracy to defraud the City, to breach any fiduciary duties owed to the City, to cause a violation of . . . [section] . . . 1090, or to cause an illegal expenditure of public funds."

".54. No defendant in the subject litigation was guilty of perpetrating a fraud, actual or constructive, on the City.

"Conclusions Of Law

". . . .

".2. With respect to the $600,000 Plan, and the satisfaction of its

injunctive relief restraining further construction of IGC's project on the further construction of IGC's project on the basis that the use and building permits were void, the trial court stated in three conclusions of law that the permits were valid.[7]

THE JUDGMENT

Consistent with the findings and conclusions, the court entered a judgment in which it ordered in pertinent part that "Plaintiffs, on behalf of the City of Albany, have and recover from defendants . . . Call the sum of $258,000 with interest thereon at the rate of 7% per annum from August 21, 1973," and that "Plaintiffs take nothing by their complaint from defendants . . . [IGC, IGD, IAC, or Cebert]. . . ." The Calls and plaintiffs filed separate notices of appeal from the judgment.

REVIEW

On their appeal, the Calls claim error in the trial court's findings and conclusions which produced the judgment against

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obligations thereunder, IGC was neither the agent nor the trustee of the City of Albany.

". . . .

".6. Councilmen Howell, Carlevaro and Hein exercised bad judgment in their consideration and acceptance of the $600,000 Plan in November, 1972, but no liability to the City arose thereby.

".7. Council Howell and Carlevaro [*sic*] are not liable to the City in any amount or at all for their acceptance of the grant deeds [*sic*] from Cebert and in their ratification of the real property purchases made pursuant to said $600,000 Plan, because of the terms of the $600,000 Plan, and the discretion vested in IGC thereby. . . ."

[7] The court stated in two of these conclusions (Nos. 10 and 11) that the use permit granted on November 13, 1972, and the building permit issued "in August of 1973" were "issued in conformance with all laws" and were "valid and proper." In conclusion of law No. 11, the court further stated: "No alleged failure of IGC, IGD or IAC to perform property and fully any obligations owed by any of them to the City of Albany under the $600,000 Plan, nor any alleged or purported breach by any of them of any such obligation, affects the validity of either the use permit or the building permit. . . ."

them in the amount of $258,000 plus interest. On the companion appeal, plaintiffs claim error in the judgment insofar as it does not hold IGC (meaning the corporate defendants) liable to the City in at least that amount, as damages, and denies injunctive relief restraining IGC from further construction of its project. These points and others are discussed in an appropriate sequence.

I

We first consider the findings and conclusions principally challenged on the appeal by the Calls. The trial court did not expressly find or concluded that the agreement between IGC and the City was "void" by reason of Call's "proscribed financial interest," but its findings of the agreement *and* the "interest" (in finding No. 44), and its definition of the latter as an "interest proscribed" by section 1090 (in conclusion of law No. 3), established that the agreement was affected by a violation of section 1090. It has been held in a consistent line of decisions that a contract which involves a violation of section 1090 or related enactments (e.g., former Pol.Code, § 920) is void. (*Moody v. Shuffleton* (1928) 203 Cal. 100, 103-105, 262 P. 1695; *Berka v. Woodward* (1899) 125 Cal. 119, 126-129, 57 P. 777; *Miller v. City of Martinez* (1938) 28 Cal. App.2d 364, 370-372, 82 P.2d 519; *Hobbs, Wall & Co. v. Moran* (1930) 109 Cal.App. 316, 318-320, 293 P. 145; *County of Shasta v. Moody* (1928) 90 Cal.App. 519, 521-523, 265 P. 1032; *Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 599-603, 229 P. 1020; see also *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 568-571, 25 Cal.Rptr. 441, 375 P.2d 289; *People v. Deysher* (1934) 2 Cal.2d 141, 146, 40 P.2d 141; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213, 145 Cal.Rptr. 461; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 289-292, 295 P.2d 113.) We read finding No. 44 and conclusion of law No. 3 as a necessarily implied determination by the trail court that the agreement between IGC and the City was void by reason of Call's "proscribed financial interest" in it.

The court did not expressly find when the agreement came into existence between IGC and the City, but this is shown in

the evidence. IGC proposed the $600,000 plan, and offered to perform it, in its letter to the City Council dated November 3, 1972. The explanation of the plan in the letter includes disclaiming references to IGC's dedicating its 2-acre parcel to the City "as a gift," and paying "all unexpended funds" to the City, with neither action to be deemed "a consideration of any zoning application. . . ." (See fn. 4, *ante*.) In the same context, however, IGC offered to perform the plan "[s]hould our application be granted" and "concurrent with the issuance of the first construction permit. . . ." (See *ibid*.) The combination of these passages is ambiguous, but it fairly appears—despite the disclaiming references—that IGC thus offered to perform the $600,000 plan on *condition* that is application for a use permit be granted and that a construction permit be issued in consequence.

It is clear that IGC's offer was "reiterated" in its letter dated November 12, 1972, and that the City Council accepted it at the meeting conducted on November 13, 1972. The combination of the offer, the acceptance, and the express exchange of consideration established that IGC and the City entered into the agreement on the date according to the elementary law of contracts. (See Civ.Code, §§ 1549, 1550, 1605; 1 Witkin, Summary of Cal.Law (8th ed. 1973) Contracts, §§ 2, 96, 135-136, 150-153, 158, 557.) Any ambiguity as to whether the issuance of a construction permit was a condition of the agreement was resolved by the subsequent conduct of the parties when that condition was expressed in the sales contracts and the construction permit itself. (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 752-754, 8 Cal.Rptr. 427, 356 P.2d 171; 1 Witkin, *op. cit. supra*, Contracts, § 527.)

Call was not a party to the contract, and we shall have occasion to return to this fact. He nevertheless had a potential financial interest in it when the City and IGC entered into it on November 13, 1972, because its performance by IGC clearly portended a sale of the 1.1-acre parcel owned by him and his wife. He acquired an actualy financial interest in it not later

than the time of closing of the escrow in which they conveyed the parcel to Cebert and it was conveyed to the City. His interest in the contract was consequential and indirect, but it was established for purposes of section 1090. (See *People v. Deysher, supra*, 2 Cal.2d 141 at p. 146, 40 P.2d 141.) The evidence thus supports the trial court's implied determination that the contract was void for Call's violation of the statute.

II

The Calls contend that the purchase of their 1.1-acre parcel was not a "condition" of the contract when IGC and the City entered into it on November 13, 1972; that the purchase was subsequently negotiated in the performance of the contract by IGC; and that the contract was accordingly valid on the authority of *Escondido Lumber etc. v. Baldwin* (1906) 2 Cal.App. 606, 84 P. 284. That case involved an agreement between a school board and a contractor for the construction of a school building. (*Id.*, at p. 607, 84 P. 284.) In performing the agreement, the contractor bought lumber from a corporate supplier of which a member of the school board was a shareholder and an employee. (*Ibid.*) The question was whether the contract for the purchase of the lumber was void by reason of a statute which was similar to section 1090 in that it prohibited a school trusteee from being "interested in any contract made by the board of which he is a member. . . .'" (2d Cal. App. at p. 608, 84 P. 284.) The Court of Appeal held that it was neither "void" nor "voidable" because of the "mere fact" that the building contractor, "without previous arrangement or agreement, saw fit" to buy the lumber from the supplier. (*Ibid.*) The court also pointed out that the building contractor had "a right to purchase his materials in the open market. . . ." (2 Cal.App. at p. 609, 84 P. 284.)

The facts shown here are wholly distinguishable. The prospect that IGC's performance of its contract with the City would involve its acquisition of the Calls' land, and the conveyance of the land to the City, was contemplated by all parties when the contract was entered into on November 13, 1972. The land was

one of only three parcels at the summit of Albany Hill which were expressly targeted in the contract for acquisition by IGC and conveyance to the City. These facts amounted to a "previous arrangement" which was missing in *Escondido Lumber*, and the limitation of the contract to the three parcels precluded its performance by IGC in the "open market" as the term was used in that decision. (See 2 Cal.App. 606 at pp. 608 and 609, 84 P. 284, quoted *supra;* see also *City Council v. McKinley, supra,* 80 Cal.App.3d 204 at pp. 213-214, 145 Cal.Rptr. 461.) *Escondido Lumber* does not apply as claimed.

III

The Calls also contend that the acquisition of their parcel by the City did not involve a violation of section 1090 because the land at the summit of Albany Hill had been "earmarked" for acquisition by the City for use as a park, and the sale of their parcel was consequently commanded by its "unique location." They argue that "necessity will excuse a transaction otherwise prohibited because of a potential conflict of interest." The authority cited for this argument is *Capital Gas Co. v. Young* (1895) 109 Cal. 140, 41 P. 869, in which gas had been furnished to a city by a utility of which the mayor of the city was a stockholder. (*Id.*, at p. 141, 41 P. 869.) The question was whether payment for the gas was precluded by a provision in the city's charter similar to section 1090. (*Id*, at p. 142, 41 P. 869.) A judgment validating payment by the city was affirmed on the principal grounds that the utility was obligated by law to furnish the gas; that it was subject to a specified statutory penalty for failure to do so; and that its performance of a legally mandated act under pain of penalty could "not be adjudged illegal." (*Id.*, at p. 144, 41 P. 869.) Neither IGC nor Call was subject to a comparable obligation or penalty in the present case. The rule of "necessity" established in *Capital Gas* has no application.

The Calls make a somewhat similar argument on the authority of an opinion by the Attorney General in which an "exception" to the "common law conflict of interest standardd"

is defined as follows: ". . . [I]t would seem to be a settled rule of necessity where an administrative body has a duty to act upon a matter involving public improvement financing and it is the only entity capable of acting in the matter, the fact that one or all members may have a personal interest in the result of the action does not disqualify them to perform their duty. [Citations.]" (54 Ops.Cal.Atty.Gen. 154, 157 (1971).) None of the City Council's actions relative to the $600,000 plan was "a matter involving public improvement financing" within the meaning of the language quoted. The "exception" claimed here does not apply.

IV

The Calls argue the defense of estoppel which they raised on their post-trial motion for leave to amend their answer to conform to the proof. They also claim error in the denial of the motion. They contend that Call acted on advice by the city attorney "that his transaction would not be inappropriate if he made a full public disclosure of his ownership and if he abstained from debating and voting on all matters which concerned his land." The Calls cite authorities which establish that the doctrine of estoppel may be applied against a governmental agency in certain cases where all its elements are present. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488-490, 91 Cal.Rptr. 23, 476 P.2d 423; *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 670-671, 197 P.2d 710; *Phillis v. City of Santa Barbara* (1964) 229 Cal. App.2d 45, 57-61, 40 Cal.Rptr. 27.)

None of the cited decisions involved a violation of section 1090 by officers of the public agencies involved. There was evidence that Call followed advice given by the city attorney on the several occasions when he abstained from voting with the City Council on questions affecting the Calls' land, or the $600,000 plan, or both. A city councilman within the reach of section 1090 may not avoid its consequences by merely abstaining from a formal vote on matters in which he has the financial interest proscribed by the statute. (*City of Imperial Beach v.*

Bailey (1980) 103 Cal. App.3d 191, 195, 162 Cal.Rptr. 663; cf. *Stigall v. City of Taft, supra*, 58 Cal.2d 565 at pp. 567-571, 25 Cal.Rptr. 441, 375 P.2d 289.)

Turner testified that the city attorney reviewed the $600,000 plan for its "legality and legal sufficiency," and approved it, before the City council accepted IGC's offer at the meeting conducted on November 13, 1972. The city attorney testified that he advised Call not to vote on is acceptance at that meeting, but that he did not advise any member of the Council that there was "any impropriety in their acting" on IGC's offer. Councilman Carlevaro testified to the same effect. The city attorney also testified that he advised Call not to vote on resolutions 73-76 and 73-78 on August 21, 1973, but that he did not advise any member of the City Council that "there was any impropriety in the City's acceptance of property that had formerly been owned by Mr. Call, a City Councilman."

This evidence supports an inference that the entire transaction was permitted to run its course because the city attorney was oblivious to the prospect that the contract constituted by the $600,000 plan was void because Call had a financial interest in it, within the meaning of section 1090, whether he voted on it or not. The evidence thus weighs in Call's favor on the question whether he was guilty of any wrongdoing in the transaction, and we return to it when we reach that question. On the Calls' point that it supports validation of the contract on the grounds of estoppel, however, there is a "well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public. . . .' [Citation.]" (*City of Long Beach v. Mansell, supra*, 3 Cal.3d 462 at p. 493, 91 Cal.Rptr. 23, 476 P.2d 423.) Section 1090 embodies such a rule. (See, e.g., *Berka v. Woodward, supra*, 125 Cal. 119 at pp. 125-127, 57 P. 777; *City Council v. McKinley, supra*, 80 Cal.App.3d 204 at p. 213, 145 Cal.Rptr. 461; *Schaefer v. Berinstein, supra*, 140 Cal.App.2d 278 at p. 290, 295 P.2d 113.) We perceive no basis for permitting the Calls to "nullify" the rule by applying the

doctrine of estoppel against the City. The trial court did not err in denying their motion for leave to plead estoppel as an affirmatiuve defense.

V

The Calls also suggest that Call's "interest" in the contract between IGC and the City was not proscribed by section 1090 because it was "remote." A "remote" interest, which will not invalidate a contract pursuant to section 1090, is defined in trailing statutes to include the "interest" of a public officer who has one of several specified relationships with the party who enters into the contract with the public agency involved. (See § 1091, subds. (a), (b); § 1091.5.) Call had no such relationship with IGC. His interest in its contract with the City was not "remote" for purposes of section 1090.

VI

The Calls contend in effect that the City's acquisition of their land was constitutionally invalid because the land was "burdened . . . [with] . . . a cross." The basis of this contention is the City Council's acceptance of the land with the "Christian type cross" standing on it subject to the protection of the easement previously granted to the Albany Lions Club. The authorities cited for the point are constitutional proscriptions pertaining to religion (U.S. Const., First Amend.; Cal.Const., art. I, § 4) and various decisions applying them (e.g., *Committee for Public Education v. Nyquist* (1973) 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948; *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, 150 Cal.Rptr. 867, 587 P.2d 663).

We later observe that the cross and the easement present problems requiring consideration, and that some of them involve the constitutional proscriptions cited by the Calls. In the first instance, however, these problems were created when Call insisted on establishing the easement before the land was sold to Cebert for conveyance to the City. The Calls will not be

permitted to escape the consequences of section 1090 by reason of problems of their own making.

As will also appear, moreover, the constitutional problems presented by the cross and the easement pertain only to the value of the land at relevant times and its use as a public park in the future. They do not reach the trial court's determinations in finding No. 51 and conclusions of law Nos. 13 through 15, which were to the effect that the *acquisition* of the land by the City was valid because it "had a secular purpose" and did not otherwise violate the constitutional proscriptions pertaining to religion. These express determinations are supported by the evidence and the law. (See, and compare, *Fox v. City of Los Angeles*, *supra*, 22 Cal.3d 792 at pp. 797-799, 150 Cal.Rptr. 867, 587 P.2d 663; *id.*, at pp. 803-813, 150 Cal.Rptr. 867, 587 P.2d 663 (conc. opn.).) The existence of the cross and the easement does not affect the determination that the contract between IGC and the City was void because Call was a "financially interested" in it within the meaning of section 1090.

VII

The Calls also challenge the effect of the judgment as a "forfeiture," contending that it amounts to an award of "punitive damages" in requiring them to pay the $258,000 to the City. We first examine whether the trial court intended it to be "punitive" in the literal sense claimed. Plaintiffs alleged in their third cause of action that Call had been guilty of wrongdoing in having breached his "fiduciary duty" to the City in specified respects. As pertinent here, they charged that he had wrongfully "participated in concert with other defendant members of the Council" in the transaction, that he had influenced them, and that he had influenced them, and that he had arranged to be paid an "artificially inflated price" for the Calls' parcel, to the "detriment" of the City in each instance.

Call was effectively absolved of having wrongfully "participated in concert" by finding No. 53, in which the trial court negated the involvement of any defendant in a "conspiracy."

(See fn. 6, *ante*.) He was absolved of "fraud" in finding No. 54. (See *ibid*.) There was no finding that he influenced any other member of the City Council, but there was no evidence that he did. There was conflicting evidence as to the value of the 1.1-acre parcel when the Calls sold it; the court made no finding of its value at any time; and there was consequently no determination that the Calls negotiated and were paid an "inflated" price for it. The court made no finding that Call had acted wrongfully in burdening the land with the easement before it was sold, but the duty to convey unburdened land to the City was an obligation of IGC under its contract with the City: it was not a "fiduciary duty" owed to the City by Call.

For these reasons, the findings actually made by the trial court have the effect of exonerating Call from any wrongdoing in the transaction. They are supported by the evidence that he and the other members of the City Council were not advised by the city attorney of the implications and effect of section 1090. The money judgment against the Calls is therefore a result of the trial court's implied determination that the contract was void. It is not an award off punitive damages, and it is not "punitive" in the sense that the court intended to punish them for wrongdoing.

It is unmistakably a "forfeiture," however, and the trial court labelled it as such. This appears in its memorandum decision, to which we may resort for the purpose of determining the process by which it reached its conclusions. (*Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.G.* (1970) 3 Cal.3d 434, 446, fn. 8, 91 Cal.Rptr. 6, 476 P.2d 406; 6 Witkin, Cal. Procedure (2d ed. 1970) Appeal, § 231.) The memorandum decision shows that the court examined the authorities dealing with section 1090; concluded that they were unclear as to the remedy to be applied here; considered alternative dispositions whereby the Calls would pay the $258,000 to the City and the City would proceed in variations of eminent domain; and dis-

carded the alternatives in favor of the City's retaining the land and recovering gthe $258,000 in a "forfeiture" by the Calls.[8]

We turn to the decisions in which the trial court found "no clear direct authority on the appropriate relief to be given" to a public agency when a contract with it is found to be void for a violation of section 1090. (See fn. 8, *ante*.) They establish, as the court observed (see *ibid*.), that injunctive relief will lie if the contract has not been performed. (see *Moody v. Shuffleton*, *supra*, 203 Cal. 100 at pp. 100, 105, 262 P. 1695: *Berka v. Woodward*, *supra*, 125 Cal. 119 at pp. 121, 129, 57 P. 777;

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[8] This reasoning is shown by the following passages in the memorandum decision:

"There appears to be no clear direct authority on the appropriate relief to be given a public body when one of its members has violated . . . Section 1090. If the transaction remains unexecuted[,] the appropriate relief would be to enjoin its consummation. Here the transaction has been fully executed. There is no doubt Call must be required to pay over to the City the funds which he has improperly received. The question is, what should be done with the real property which was the subject of the transaction. If Call were allowed to retake the property the City would presumably be left with the necessity of exercising eminent domain to condemn the property at this time, if the City chooses to pursue the plan to create the public park . . . .

"If the Court were empowered to do so it would be inclined to require that Call pay over to the City the funds he has received and that the City be required promptly to bring an action in eminent domain with the valuation date to be fixed at August, 1973, taking into account any diminution in value caused by the existence of the . . . easement. However, there appears to be no authority for such powers to be exercised by this Court in this proceeding.

"The only alternative will result in a forfeiture by [the] Calls, but perhaps that is an appropriate result in this case. The judgment will therefore be that defendant Call has violated the provisions of Section 1090 . . . and that judgment should therefore be rendered in favor of the City and against defendants Call in the amount of $258,000, together with interest from August 21, 1973. . . ."

Hobbs, Wall & Co. v. Moran, *supra*, 109 Cal.App. 316 at pp. 317, 321, 293 P. 145; *Stockton P. & S. Co. v. Wheeler*, *supra*, 68 Cal.App. 592 at pp. 595-596, 603, 229 P. 1020.) They also establish that where it has been performed by both sides, as in the present case, the agency is entitled to recover the consideration it has paid or delivered to the other contracting party. (*Miller v. City of Martinez*, *supra*, 28 Cal. App.2d 364 at pp. 370-372, 82 P.2d 519; *County of Shasta v. Moody*, *supra*, 90 Cal.App. 519 at pp. 519-520, 523-524, 265 P. 1032.

In the latter situation, the agency may retain the value of the other party's performance of the contract without alleging or proving its restitution or an offer to restore it to him. (*Miller v. City of Martinez*, *supra*, 28 Cal.App.2d 364 at pp. 370-372, 82 P.2d 519; *County of Shasta v. Moody*, *supra*, 90 Cal.App. 519 at pp. 523-524, 265 P.2d 1032; see also *Berka v. Woodward*, *supra*, 125 Cal. 119 at pp. 124-127, 57 P. 777.) None of the cited decisions describes this result as a "forfeiture" by the other party of the value received from the agency, but it amounts to one. The result has been justified on the principles that his interests must yield to the paramount "rights of the public"; that "no court shall lend its aid to a man who grounds his action upon an . . . illegal act"; that there is consequently "no place for equitable considerations, presumptions or estoppels" in the action; and that restitution to the party who contracted with the agency will therefore not be permitted on a theory of implied contract. (*Berka v. Woodward*, *supra*, at pp. 127-129, 57 P. 777; *Miller v. City of Martinez*, *supra*, at pp. 370-371, 82 P.2d 519; *County of Shasta v. Moody*, *supra*.)

In each of these decisions, however, the contract found to be void was between a public agency and a vendor for the purchase of goods or services by the agency; the consideration retained by the agency was the goods or services themselves, which had been delivered or rendered to the agency when the vendor performed and the consideration recovered by the agency, and forfeited by the vendor, was the money the agency had paid for the goods or services when it performed. (See *Berka v. Wood-*

ward, supra, 125 Cal. 119 at p. 121, 57 P. 777 [building materials]; *Miller v. City of Martinez, supra*, 28 Cal. App.2d 364 at pp. 365-366; 82 P.2d 519 [petroleum products]; *County of Shasta v. Moody, supra*, 90 Cal.App. 519 at p. 520, 265 P. 1032 [job printing and supplies]; see also *Moody v. Shuffleton, supra*, 203 Cal. 100 at pp. 100-101, 262 P. 1695 [job printing and supplies]; *Hobbs, Wall & Co. v. Moran, supra*, 109 Cal.App. 316 at p. 317, 293 P. 145 [merchandise and supplies].)

There are significantly distinguishable features in the present case. The contract found to be void was between IGC and the City, and the Calls were not parties to it. It was for the acquisition of land by the City from IGC, not from the Calls as vendors. The consideration the City retains is the land, which it received when the contract was performed by IGC. The consideration it recovers in the "forfeiture" by the Calls is the money paid to them for the land by IGC, not by the City.

The "forfeiture" by the Calls results from the trial court's reasoning that "Call must be required to pay over to the City the funds which he has improperly received." (See fn. 8, *ante*.) The section 1090 decsions would support that requirement if Call and the City were the parties to the contract found to be void, and if he had received the funds from the City when the contract was performed. The decisions do not support a requirement that he pay "to the City" funds which he received from a third person in the performance of a contract to which he was not a party. It thus appears that the trial court applied two-party law in a three-party situation to which it may not be applied with the results the court reached. Stated another way in the context of the court's findings and conclusions, the decisions dealing with contracts found to be void for a violation of section 1090 do not support a "forfeiture" by one who was not a party to the contract; who did not "conspire" or commit "fraud" in its inducement, execution, or performance; and who violated section 1090 by acquiring a financial interest in the contract, but who has been absolved from wrongdoing in connection with it. We are therefore required to reverse the judgment insofar as it orders the Calls to pay the City $258,000 plus interest.

The section 1090 decisions would support a "forfeiture" by IGC, as the other party to the contract found to be void, if it were in a position comparable to the vendors of goods or services in those cases. It is not in that position because of the unique features found here, but the inquiry cannot end at this point. Notwithstanding the fact that IGC's contract with the City has been found void, it obligated IGC to convey fair value to the City in the form of land which was suitable for use as a public park. There is substantial evidence supporting an inference that the 1.1-acre parcel IGC acquired from the Calls and conveyed to the City, through Cebert, represents less than fair value because of the undetermined—but obvious—extent to which its value has been diminished by the cross and the easement on the land.[9] There is also substantial evidence supporting inferences that the easement actually protects the location and existence of the cross, and that the land is consequently unsuitable for use as a municipal park because of the constitutional proscriptions which preclude the display of a religious symbol on public property. (See *Fox v. City of Los Angeles*, *supra*, 22 Cal.3d 792 at pp. 797-799, 150 Cal.Rptr. 867, 587 P.2d 663; see also *id.*, at pp. 802-813, 150 Cal.Rptr. 867, 587 P.2d 663 (conc. opn.) and authorities there cited.)

Because of the undisputed fact that the IGC allowed the land to be burdened with the easement before having it conveyed to the City pursuant to the contract, the evidence supports a terminal inference that IGC breached the contract in performing it. The trial court expressly acknowledged this in its memorandum decision, but concluded that a remedy for breach by IGC did not lie in the present action because plaintiffs had not pleaded it; that it consequently provided no basis for a judg-

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[9] The trial court observed in its memorandum decision that "[w]ith the cross and unrestricted easement on the property, . . . the property was virtually undevelopable and therefore of virtually no commercial value." Although this observation was not expressed in a formal finding of the actual value of the land, it is clearly supported by the evidence.

ment against IGC in the action; and that the remedy for it was to be asserted in other litigation if the City desired to pursue it.[10] These conclusions are reflected in finding No. 52, where the court determined that "IGC . . breached no duties owed to the City . . . , complied with all conditions imposed on it by the City . . . , and performed all obligations owed by it to the City . . . , *in the issues raised by the pleadings* . . ." (See fn. 6, ante [italics added here].)

The result permits IGC to escape liability to the city for an apparent—if not formally determined—breach of the contract

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[10] The court stated in the memorandum decision as follows: "IGC does appear to have been guilty of one breach of its agreement . . . [with the City] . . . . Though IGC was motivated solely by a desire to obtain a building permit and to protect its development, . . . it recognized that the City . . . was interested in making a public park at the top of the hill. IGC therefore used that as its inducement to the City as, for example, in the letter of November 3, 1972 offering 'to make a major effort to preserve the Albany Hill top for public use,' and promising the City 'a unique, superb and useful view park for the public enjoyment.' The sales agreement with Call . . . called for title free and clear of all liens, encumbrances, easements, et cetera. Notwithstanding this, . . . IGC consented to a demand of Call . . . that title be taken subject to . . . an unrestricted easement of access by the Albany Lions Club to and for maintenance of . . . [the] . . . cross which had been erected on the Call property.

"The President . . . of IGC [Wilson] testified that Call was allowed to impose the burden of the easement because IGC didn't care what restrictions might be placed upon the property as long as they did not constitute a potential threat to the development of IGC's property . . . . Allowing the property to be so encumbered can hardly be said to be consistent with 'a major effort to save and preserve the Albany Hill top for public use,' given the legal and practical complications thus entailed. However, the Court perceives no cause of action in plaintiffs' complaint embracing such a breach; and it is concluded . . . that in this action no judgment can or should be rendered against IGC. This decision, however, is without prejudice to any right of action the City may have by [way of] specific performance or damages . . . by reason of any such breach."

conceived by it, and sold by it to the City for its (IGC's) own advantage in protecting its project from competitive development, on the basis that such breach and liability were not expressly pleaded by plaintiffs in their successful action founded on the premise that the contract was void for a violation of section 1090. We raise an issue as to this result, for the first time on appeal but in our discretion, because its prospects for detriment to the City present an important question involving the public interest. (See *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App. 3d 1, 5, 97 Cal.Rptr. 431; *Isthmian Lines, Inc. v. Schirmer Stevedoring Co.* (1967) 255 Cal.App.2d 607, 610, 63 Cal.Rptr. 458; see also *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1938) 34 Cal.3d 412, 417, 194 Cal.Rptr. 357, 668 P.2d 664.) We conclude that the result is not warranted by the narrow view on which it was based; that deferment of the questions whether IGC breached the contract, and whether it should be liable to the City therefor, is not in the public interest; that the questions should be litigated and resolved in the present action; and that plaintiffs' failure to plead them may readily be remedied by amendment of the complaint to conform to the proof.

IGC's liability to the City in damages for a breach—if pleaded by amendment and proved, as hereinafter authorized—would not impose a "forfeiture" on it within the meaning of the section 1090 decisions previously cited, but it would achieve the equivalent by adaptation to the unique features of this case. It would otherwise be consistent with those decisions because it involves only the *remedy* to be applied where—as they hold—a contract with a public agency is void if an officer of the agency is "financially interested" in it within the meaning of the statute. Such liability would also be consistent with the rule that a void contract may be enforced if the result thereof will be justified by such considerations as the relative culpability of the parties to the contract, the prospect of unjust enrichment if it is not enforced, and the policy underlying the statute involved. (See *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 150-151, 308 P.2d 713; *Homestead Supplies, Inc. v. Executive*

Life Ins. Co. (1978) 81 Cal.App.3d 978, 990-991, 147 Cal.Rptr. 22.) We expressly hold that these considerations warrant pursuit of a remedy against IGC, on behalf of the City and in the present action, for breach of the contract embodied in the $600,000 plan.

The sixth count in Plaintiffs' complaint is captioned "Breach of Fiduciary Duty," but it includes allegations to the effects that IGC offered the $600,000 plan to the City; that the City accepted; that there was an exchange of consideration; and that IGC's actions in performing the plan caused "direct and consequential damages" to the City which included (but were "not necessarily limited to") the amount paid for the 1.1-acre parcel in "excess of fair market value . . . ." In light of these allegations and the evidence, it is the sixth count which may appropriately be amended to include allegations (1) that IGC breached the contract by conveying an encumbered title to the City and (2) that the City was damaged by the breach in an amount or amounts to be ascertained.

This amendmen is not precluded by the mere label heretofore appended to the sixth count. (Cf. *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 833, 134 Cal.Rptr. 839.) The amended count will not impermissibly state a new cause of action because it will relate back to "the same general set of facts" which were initially alleged in it. (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600-601, 15 Cal.Rptr. 817, 364 P.2d 681; cf. *Earp v. Nobmann* (1981) 122 Ca.App.3d 270, 286, 175 Cal.Rptr. 767.) For the same reason, the amended count will not be barred by any statute of limitations. (*Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932 935-940, 136 Cal.Rptr. 269, 559 P.2d 624; *Austin v. Massachusetts Bonding & Insurance Co., supra.*) By way of asserting their standing to sue on the sixth cause of action as to taxpayers, plaintiffs initially alleged in it that they had served the City Council with a demand that "said Council authorize and direct the institution . . . of suit on behalf of defendant City . . . to vindicate all rights of the City arising out of the . . .

transaction" involving the $600,000 plan. It was agreed at the trial that plaintiffs had "made a timely demand on the City . . . to bring this action . . . ." They thus have standing to proceed on the sixth cause of action if it is amended as described.

On the remand hereinafter ordered, the trial court will accordingly authorize the described amendment if plaintiffs apply for leave to effect it. IGC may thereafter plead to the sixth cause of action as amended, and the issues thus joined (whether IGC breached the contract and whether it is consequently liable to the City) are to be tried and resolved in due course. (See Code Civ.Proc., § 469; *Mountain States Creamery Co. v. Tagerman* (1952) 39 Cal.2d 355, 356-357, 246 P.2d 21; 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 1059, p. 2635.)

It will not be necessary to retry questions pertaining to whether a violation of section 1090 occurred in fact, nor its consequences, and the trial court's previous determinations in these respects will stand. An issue may remain as to whether the Calls should be obligated to pay all or part of the $258,000 to IGC, as distinguished from the City. There are no cross-pleadings shown in the present record which will permit that result. It is therefore the Calls and IGC as private parties, not the City, who are to be relegated to other litigation for the resolution of any residual disputes between them.

VIII

We turn to plaintiffs' appeal. They contend that the trial court erred in failing to hold the corporate defendants liable to the City, jointly with the Calls, on either of two theories. Joint liability with the Calls is not a possibility because of the result reached on their appeal, but the theories should be discussed. One is the theory that the corporate defendants acted as the City's agents in the performance of the contract embodied in the $600,000 plan, and that they should be held liable to it for breaching the duties imposed on them as agents. The other is the theory that they acted as trustees for the City, and that

they should be held liable for breaches of trust. Plaintiffs pleaded both theories against the corporate defendants, but the trial court determined in conclusion of law No. 2 that "IGC was neither the agent nor the trustee of the City" in the performance of the $600,000 plan. (See fn. 6, *ante*.) This determination is supported by the evidence. The corporate defendants are not liable to the City on either theory advanced by plaintiffs.

Plaintiffs also contend that the judgment erroneously deniees them injunctive relief restraining IGC from further construction of its project. The trial court correctly concluded that the use permit and the building permit were valid as issued, and that their validity was not affected by any "failure of IGC" to have performed its contractual obligations to the City. (See fn. 7, *ante*.) We therefore affirm the judgment insofar as it denies injunctive relief.

In the interests of clarity, we also affirm the judgment with regard to the trial court's determinations that section 1090 was violated,and that the contract between IGC and the City was consequently void; and in other respects in which it is silent, but which have not been challenged on either appeal.

* * *

The judgment is affirmed insofar as it reflects the determination by the trial court that the contract entered into between the City of albany and Interstate General Corporation on November 13, 1972, is void because defendant Hubert F. Call was financially interested in it within the meaning of Government Code section 1090; insofar as it denies relief in the action as to the defendants Carlevaro, Hein, and Howell; and insofar as it denies injunctive relief in the action. The judgment is otherwise reversed. The cause is remanded to the trial court with directions to hear and decide other issues consistent with this opinion. Plaintiffs and appellants Bruce Thomson et al. shall recover their costs on both appeals. The other parties shall bear their own costs.

CALDECOTT, P.J., and POCHE, J., concur.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

No. 448248-8

BRUCE THOMSON, *et al.*,

Plaintiffs,

v.

CITY OF ALBANY, CALIFORNIA,
a municipal corporation, *et al.*,

Defendants.

AND CROSS-COMPLAINT

SIGNED COPY FILED
May 2, 1978

JUDGMENT

This cause came on regularly for trial on January 3, 1978, in Department 20 of the above-entitled Court, the Honorable Robert H. Kroninger, Judge, presiding, sitting without a jury, a jury having been duly waived. Plaintiffs appeared by Cooper, White & Cooper, E. Garth Black and Neil L. Shapiro; defendants Interstate General Corporation, Interstate General Development, Interstate Albany Corporation, and Cebert Properties, Inc., appeared by the Law Offices of Edward Fitzsimmons, Richard Heimann; defendants Hubert F. Call and Ruth L. Call appeared by Jerome Berg; defendants City of Albany, Joseph Carlevaro, George Hein and Lewis Howell appeared by Lawrence Saler, City Attorney of the City of Albany, and by Den-Dulk, Douglas & Anderson, Robert T. Anderson; and defendant Jack Krystal appeared by Jack Schwartz. Evidence, both oral and documentary, having been presented by all parties, plaintiffs having dismissed the action

as to Jack Krystal, the Court having granted the motions of Joseph Carlevaro, George Hein and Lewis Howell for judgment at the close of plaintiffs' case and judgment having been entered accordingly, the cause having been submitted for decision, and the Court having caused to be made and filed its written Findings of Fact and Conclusions of Law.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs, on behalf of the City of Albany, have and recover from defendants Hubert F. Call and Ruth L. Call the sum of $258,000 with interest thereon at the rate of 7% per annum from August 21, 1973 until paid, together with allowable costs and disbursements;

2. Plaintiffs take nothing by their complaint from defendants Interstate General Corporation, Interstate General Development, Interstate Albany Corporation, or Cebert Properties, Inc., and that said defendants have and recover from plaintiffs allowable costs and disbursements;

3. Plaintiffs' application for any award of attorneys' fees shall be and is deferred until the judgment in this action becomes final.

Dated:

Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

No. 448248-8

BRUCE THOMSON, *et al.*,

Plaintiffs,

v.

CITY OF ALBANY, CALIFORNIA,
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Defendants.

AND CROSS-COMPLAINT

ENDORSED FILED
May 2, 1978
RENE C. DAVIDSON, County Clerk
Rosalynn Kennon, Deputy

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter having been submitted on briefs after bifurcated trial on plaintiffs' complaint only, and plaintiffs having dismissed the action against defendant Krystal and the Court at the close of plaintiffs' case having granted the motion for judgment of defendants Howell, Hein and Carlavaro, the Court makes the following findings of fact:

FINDINGS OF FACT

1. Plaintiffs, and each of them, were at all times relevant to this litigation residents of the City of Albany, and within one year prior to the commencement of this litigation, plaintiffs, and each of them, paid a tax to the City of Albany.

2. Plaintiffs, and each of them, made a timely demand on the City of Albany to institute and commence the subject litigation, and the City of Albany refused to institute or commence the subject litigation.

3. Plaintiffs timely instituted and commenced the subject litigation after the denial by the City of Albany of plaintiffs' demand that the City of Albany institute and commence the subject litigation.

4. Defendant Joseph Carlevaro ("Carlevaro"), George C. Hein ("Hein"), Lewis M. Howell ("Howell") and Hubert F. Call ("Call"), and each of them, were members of the Albany City Council during the years 1972 and 1973.

5. Defendant Ruth L. Call was at all times relevant and is the lawful wife of defendant Hubert F. Call.

6. Defendant City of Albany was at all times relevant and is a municipal corporation, authorized and existing under and by virtue of the laws of the State of California.

7. Defendant Interstate General Corporation ("IGC") was at all times relevant and is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and conducted business within the County of Alameda.

8. Defendant Cebert Properties, Inc. ("Cebert") was at all times relevant and is a corporation organized and existing under and by viture of the laws of the State of Deleware, and conducted business within the County of Alameda.

9. Defendant Interstate Albany Corporation ("IAC") was at all times relevant and is a corporation organized and existing under and by virtue of the laws of the State of California, and has its principal place of business, and conducted business, within the County of Alameda.

10. Defendant Interstate General Development ("IGD") was at all times relevant and is a corporation organized and existing under and by viture of the laws of the State of Delaware, and conducted business within the County of Alameda.

11. Defendant IAC was at all times relevant and is a subsidiary of IGD. IGD was at all times relevant and is a subsidiary of IGC. The stock of Cebert was at all relevant times and is owned by James J. Wilson as trustee for the benefit of the children of Robert T. Wilson, brother of James J. Wilson. James J. Wilson was at all times relevant and is the president of IGC, IGD and IAC, and was and is a director of IGC, IGD, IAC and Cebert. For all relevant matters, IGC, IGD, IAC and Cebert, and each of them, acted as agents and servants for each other, and had unity of purpose and concurrence of action.

12. For more than one year prior to April, 1972, the City of Albany and residents of the City of Albany had an interest in and plans for an "overlook" park on Albany Hill. The park plans of that period included land owned by defendants Ruth Call and Hubert Call.

13. Prior to April, 1972, IGC owned certain real property at the western base and along the western slope of Albany Hill, a hill located in the City of Albany, County of Alameda, which it wished to develop with high-rise residential construction totaling approximately 2,500 individual dwelling units, and with related parking facilities and commercial development. Inquiries were made in approximately April of 1972 of James Turner ("Turner"), City Administrator of the City of Albany, by Robert O'Donnell, a planner acting at the request of and on behalf of IGC, as to the steps necessary to apply to the City for permission to construct the aforementioned development.

14. On or about May 15, 1972, by Ordinance No. 72-05, the Albany City Council ("Council") ordered that no permit for the erection of any building or structure could be issued by the City for the area denominated as the Hill Control District by Ordinance 61-011 unless and until a use permit was first obtained from the Council. By Ordinance 72-013, passed on or about September 5, 1972, the Council extended the effectiveness of Ordinance 72-05 for an additional eight months beyond its September 15, 1972 termination date. The land which IGC

wished to develop, as well as the relevant land owned by Ruth and Hubert Call, were within the Hill Control District.

15. In or about July, 1972, IGC applied to the Council for a use permit, to allow it to proceed with its planned development. Between July and November of 1972, the Council held public hearings concerning the pending IGC application.

16. On or about October 24, 1972, the City, through Lawrence Saler ("Saler"), City Attorney for the City of Albany, and James Turner, communicated to IGC the proposed conditions under which the City was willing to issue the requested use permit. (Exhibit 2.) Condition 5 required IGC to deed to the City two hilltop acres and four creekside acres for use as parkland. Condition 6 required IGC to preserve and maintain as perpetual open space, with recordation of appropriate deed restrictions, 18 acres of its land, and to allow public access to that land for passive recreational pursuits during all hours at which adjacent parks were open to the public. Conditions 7 and 8 required IGC, at its own expense, to make improvements on the lands described in Conditions 5 and 6.

17. On or about November 3, 1972, IGC rejected in part the proposed conditions of the City, and offered a counterproposal by letter to the Council, as well as by proposed conditions. (Exhibit 4.) The proposed conditions were silent as to privately-owned open space, with public access, but did offer to dedicate and deed two hilltop acres to the City as parkland. The accompanying letter of the same date stated:

> "As an alternative to the public open space on a portion of our property, we offer. . . the following:
>
> "Should our application be granted, we agree to allocate $600,000.00 to acquire such of the real property as may be available, first by private negotiation at what we, in our judgement, regard to be reasonable prices, at the hilltop area of Albany Hill, within the boundary line designated by the City of Albany's park and Overlook Park."

18. On or about November 10, 1972, Saler and Turner, on behalf of the City, rejected in part the conditions proposed by

IGC for its requested use permit, and proposed conditions to IGC. Condition 5 sought the same land by dedication and deed as had the City's proposed conditions of October 24, 1972, and Condition 6 sought the same 18 acres of perpetual open space, privately owned and maintained, but open to the public. Condition 7 required IGC to improve and maintain the perpetual open space referenced in Condition 6.

19. On or about November 12, 1972, IGC rejected in part the proposed conditions of the City, and offered a counter-proposal by letter to the Council, as well as by proposed conditions. The proposed conditions were silent as to privately-owned open space, with public access, but did offer to dedicate and deed two hilltop acres to the City as parkland. The accompanying letter of the same date stated that IGC would establish the undeveloped land as perpetual open space, with appropriate deed restrictions, and that IGC would maintain said property, but declined to allow public access to that area. The same letter renewed the offer of November 3, 1972 to dedicate and deed two hilltop acres to the City as parkland and "to allocate $600,000.00 for the purpose of first purchasing additional private property to encompass the proposed Overlook Park of Albany Hill, all at or above the 200' contour of the hill. . ." for the use by the City as parkland. The same letter offered, as an alternative to the two hilltop acres and the $600,000 allocation, to dedicate and deed to the City the four creekside acres referenced in the City's original proposed Condition 5. IGC's proposal to the City of Albany includes the implied condition that the land to be actually tendered to the City pursuant to the $600,000 Plan would be constitutionally suitable for ownership by a city and use by it as a public park.

20. On occasion, Hubert Call asked the City Attorney whether or not he could speak on certain issues or vote on certain issues pending before the Albany City Council, and on such occasions was advised not to speak or vote if real property in which he had a financial interest was involved in the pending issues. Call followed such advice when it was sought and given.

Call was told by the City Attorney that he could discuss and vote on IGC's applications for rezoning and for Use Permit No. 20.

21. On November 13, 1972, at a regularly scheduled Council meeting, the Council, with affirmative votes by Councilmen Call, Hein, Howell and Carlevaro, granted a request by IGC for a rezoning of its property from R-1-H-C [single-family residences] to R-3-H-C [high density, high-rise development] to allow the planned development. Thereafter, at the same meeting, with the same affirmative votes, the Council granted Use Permit No. 20 to IGC, approving with minor modification the proposed conditions submitted by IGC on or about November 12, 1972. Thereafter, at the same meeting, with affirmative votes by Councilmen Clark, Carlevaro, Hein and Howell, and with an abstention by Councilman Call, the Council accepted the offer of IGC made in its letters of November 3 and November 12, 1972 to allocate $600,000 ("the $600,000 Plan") for the purchase of private property to supplement the two hilltop acres owned by IGC, to encompass the proposed Overlook Park of Albany Hill.

22. The offer of the $600,000 Plan, and the acceptance thereof by the City of Albany on November 13, 1972, did not vest in the City of Albany any right or power to control the real property acquisitions of IGC in its performance of the $600,000 Plan. At no time did the City of Albany attempt to control any act of IGC relating to said real property acquisitions. IGC was neither the agent nor the trustee for the City of Albany or for any other person or entity as a consequence of the $600,000 Plan.

23. Among the parcels of real property within the boundaries established by the $600,000 Plan was a parcel of real property owned jointly by Councilman Hubert Call and Ruth Call. Such real property ownership by Ruth and Hubert Call within said boundaries was disclosed by Hubert Call to the other members of the City Council and to the public prior to

voting by the Albany City Council on the offer of IGC of the $600,000 Plan.

24. In mid-February, 1973, Eugene Hill ("Hill"), a vice president of IGC, IGD and Cebert, was sent by IGC to the Albany area to obtain a building permit for the project, to acquire or oversee the acquisition of property pursuant to the $600,000 Plan, and, in general, to get the proposed development constructed.

25. In futherance of IGC's performance under the $600,000 Plan, Hill retained Elliot Ball, an appraiser, to appraise the real property available that met the terms of the $600,000 Plan and the desires and needs of the parties. The only real property meeting said qualifications were a 2.1-acre parcel owned by Albany Hill Associates, a 1.1-acre parcel owned by Ruth and Hubert Call, and approximately 2 acres of an approximately 11.5-acre parcel owned by Golden Gate Hill Development Company.

26. Pursuant to his assignment, Elliot Ball appraised the three available parcels of real property, and submitted written reports of his appraisals to Hill. Ball appraised the parcel owned by Ruth and Hubert Call ("Call Parcel") at $63,800, appraised the upper portions of the parcel owned by Golden Gate Hill Development Company ("Golden Gate Parcel") at $31,900 per acre, and appraised the Albany Hill Associates parcel at $211,700.

27. On the basis of the Elliot Ball appraisals, Hill forwarded written offers to the owners of all three parcels. Hill offered $63,800 for the Call Parcel, $211,700 for the Albany Hill Associates parcel, and, while intending to follow the appraisal, offered $31,900 for the entire 11.5-acre Golden Gate Parcel. Each offer made was conditional in that each stated that "the closing of this offer will be a concurrent condition with the issuance of a complete building permit on all properties of the undersigned by the appropriate authorities of the City of Albany." Call and the Albany Hill Associates rejected said offers in writing, and submitted counteroffers. Golden Gate

Hill Development Company did not respond to the offer. At the same time Hill forwarded the offer to Call, Hill knew that Call was a member of the Albany City Council.

28. When the offers were rejected, expressly or by silence, Hill was instructed by James Wilson ("Wilson"), founder and president of IGC, to authorize a real estate broker to negotiate with the property owners to arrange purchases in satisfaction of the $600,000 Plan. Pursuant to said instructions, Hill authorized Jack Krystal ("Krystal"), a Marin County real estate broker, in writing to commence negotiations for the purchase of the available parcels of real property.

29. Krystal contacted Golden Gate Hill Development Company concerning Hill's offer, and was told that the offer was too low. Krystal advised that the offer was for the top two acres, not the entire parcel, and raised the offer to $40,000 for the two acres. His offer was rejected, and he was told no negotiations could continue in the absence of a further written offer. Krystal verbally invited a counteroffer to his offer of $40,000, suggesting a counteroffer of $100,000, but no counteroffer was made, and Krystal made no further written offers. Krystal then abandoned negotiations for the Golden Gate Parcel.

30. The City of Albany was aware, in 1973, that if Golden Gate Hill Development Company ever sought permission to develop portions of its approximately 11.5-acre parcel, such permission could probably be conditioned upon the deeding by Golden Gate Hill Development Company to the City of the upper 2 acres of the aforementioned parcel.

31. In response to Call's rejection of Hill's offer of $63,800, and in response to Call's written counteroffer of $360,000 for the Call Parcel, Krystal offered, in writing, $180,000 to $190,000 for the 1.1-acre Call Parcel. Thereafter, through verbal negotiations, Krystal and Ruth and Hubert Call agreed on $258,000 as the price of the Call Parcel. During the aforementioned negotiations, Krystal told Call that the Call Parcel would be deeded to the City for use as a park, pursuant to the $600,000 Plan.

32. The agreement between Ruth and Hubert Call and Krystal was reduced to writing on June 25, 1973 in the form of a Real Estate Purchase Contract and Receipt for Deposit (Exhibit 31), in which IGC obligated itself to pay $258,000 to Ruth and Hubert Call for the Call Parcel. Said contract was "conditioned upon purchaser being issued all necessary permits to a project located adjacent to this property."

33. Neither the IGC proposal to the City of Albany nor the Real Estate Purchase Contract and Receipt for Deposit between IGC and Ruth and Hubert Call required that the Call Parcel be offered to the City as part performance of the $600,000 Plan, nor did either require that the City accept the Call Parcel if offered to the City burdened with a cross and with an easement for the maintenance of the cross for the benefit of a private service club. Money could have been tendered in complete satisfaction of the $600,000 Plan.

34. In response to Albany Hill Associates' rejection of Hill's offer of $211,700, and in response to Albany Hill Associates' counteroffer of $450,000 for its parcel, Krystal offered $280,000 or $290,000. Thereafter, through verbal negotiations, Krystal and Albany Hill Associates agreed on $340,000 as the price of the Albany Hill Associates parcel. On June 25, 1973, said agreement was reduced to writing. (Exhibit 32.) Said contract was "conditioned upon purchaser being issued all necessary permits to a project located adjacent to this property."

35. In 1973, two consolidated lawsuits against IGC, which raised issues unrelated to the instant litigation, were settled, and, as part of the settlement, IGC agreed to deed to the City of Albany concurrently with the issuance by the City of Albany of a building permit for the project the approximately 4-acre creekside parcel referenced in the negotiations for Use Permit #20. Said Parcel was conveyed to the City of Albany concurrently with the issuance to IGC of the initial building permit.

36. On or about August 17, 1973, Ruth and Hubert Call submitted escrow instructions (Exhibit 11) to the escrow

holder, conveying a Grant Deed to Cebert for the Call Parcel (Exhibit 19) and a Grant Deed to the Albany Lions Club and Lions International for an easement on the Call Parcel for ingress and egress for the maintenance of a cross (Exhibit 18), and directing said escrow holder to deliver said deeds to the grantees upon deposit with the escrow holder of the $258,000 sale price for the Call Parcel. On or about the same date, Albany Hill Associates also submitted escrow instructions to the escrow holder. (Exhibit 13.)

37. On or about August 23, 1973, the City submitted escrow instructions to the escrow holder, conveying a Building Permit for the first phase of the IGC development, and instructing the escrow holder to transmit said Building Permit to IAC when the escrow holder was able to transmit to the City $68,012.35 (Building Permit application fee), $2,000 (the unexpended balance of the $600,000 Plan), grant deeds for the two hilltop acres, the Call Parcel, the Albany Hill Associates Parcel, and the four-acre creekside parcel which IGC agreed to convey in settlement of unrelated litigation, and a copy of the Building Permit after execution of same by the owner, architect or builder of the development. (Exhibit 22.)

38. On or about August 23, 1973, IAC submitted escrow instructions to the escrow holder, referencing anticipated deposits of $600,000 and $68,012.35, and instructing the escrow holder to use the $600,000 to fulfill instructions submitted by sellers (Ruth and Hubert Call, Albany Hill Associates), with the balance to the City, and to deliver to the City $68,012.35, once the escrow holder obtained possession of the issued Building Permit for the first phase of the development. (Exhibit 12.)

39. The foregoing escrow instructions of IAC and the City were in reference to escrow number OK-220776, while the instructions of Albany Hill Associates and Ruth and Hubert Call were in reference to escrow numbers OK-220776A and OK-220776B, respectively. The escrow holder was Title Insurance and Trust Company, Oakland, California. The aforementioned escrow or escrows closed on or about August 24, 1973,

and the grant deeds from Ruth and Hubert Call to the Albany Lions Club, Lions International, and to Cebert, were recorded in that order on the same date. The grant deed from Albany Hill Associates to Cebert was recorded on the same date, as were grant deeds from Cebert to the City concerning the Call Parcel and the Albany Hill Associates parcel. The aforementioned grant deeds from Ruth and Hubert Call were signed by them on August 17, 1973, and the deed of easement from Ruth and Hubert Call to the Albany Lions Club and Lions International was recorded ahead of the deed from the Calls to Cebert.

40. Prior to the formal close of escrow, with the attendant conveyances of real property and delivery of funds and the Building Permit, the grant deed from Cebert to the City had to be accepted formally by the City pursuant to Government Code § 26281. On August 21, 1973, the Council adopted Resolution 73-76, a formal resolution entitled "A Resolution of the Council of the City of Albany Accepting a Corporation Grant Deed from Cebert Properties, Inc., a Delaware Corporation, and Authorizing the Mayor to Accept and Consent to Such Deed." (Exhibit 33.) Call abstained from voting on Resolution 73-76, on the advice of the City Attorney, stating that "he formerly held interest in a portion of the property involved" (Exhibit 9), but Councilmen Carlevaro, Clark and Howell voted in favor of the resolution, with Councilman Hein absent.

41. At the same meeting, the Council, at the request of Wells Fargo Bank, an institution providing the financing to IGC for the acquisitions under the $600,000 Plan, adopted Resolution 73-78, "A Resolution of the Council of the City of Albany Ratifying the Purchases of Certain Properties in Satisfaction of the Agreement with Interstate General Corporation" (Exhibit 34), affirmative votes being cast by Councilmen Carlevaro, Clark and Howell, with Call abstaining on the advice of the City Attorney, and with Councilman Hein absent. Said resolution stated, in relevant part, that "WHEREAS, the Council has examined the expenditures made for the purchases referred to herein . . . the Council of the City of Albany does

approve and ratify the purchases of the certain real properties more fully described in that Grant Deed referred to in Resolution No. 73-76."

42. At the same meeting, the Council, by Resolution 73-66, approved IGC's tract map for the project, with all councilmen present voting affirmatively.

43. On or about August 23, 1973, Turner issued Building Permit No. 1703 to IAC, said issuance being conditioned upon compliance with all building codes, all conditions of Use Permit No. 20 and all terms of or obligations created by the $600,000 Plan. (Exhibit 23.)

44. The purchases of real property by IGC through Cebert, and the conveyances of said real property to the City were in performance of a single agreement entered into between IGC and the City, the terms and conditions of which are reflected in IGC's letters of November 3, 1972 and November 12, 1972, the relevant resolutions adopted by the Council concerning the Use Permit, the $600,000 Plan, the acceptance of deeds from Cebert and the ratification of purchases made by IGC or Cebert of real property for conveyance to the City, the Use Permit, the Building Permit, the Real Estate Purchase Contracts and Receipts for Deposit concerning the Call Parcel and the Albany Hill Associates Parcel, and the escrow instructions concerning the purchase and conveyance of the Call Parcel and the Albany Hill Associates Parcel. Call had a financial interest in said agreement.

45. The Council meeting of August 21, 1973 was preceded by a work session of the Council open to the public but attended only by Saler, Turner and Councilman Howell, who was then also the Mayor of the City of Albany. At the work session, Mayor Howell was advised of the parcels being purchased pursuant to the $600,000 Plan, as well as the amount to be paid for each parcel. Specifically, Mayor Howell was advised that a total of only 3.2 acres would be purchased for $598,000, that Albany Hill Associates would receive $340,000, or $3.72 per square foot, that Ruth and Hubert Call would receive $258,000,

or $5.38 per square foot, and that, since the purpose of the meeting was to consider acceptance of the real property by the City and a determination by the Council that the values indicated were reasonable, he should ask Turner at the meeting itself to delineate the cost relationships just reviewed in order that all members of the C ouncil could be fully apprised. At the meeting of August 21, 1973, however, the Mayor made no such request of Turner, and the other Councilmen were not advised of the aforementioned details of the transactions.

46. Had the City refused to accept the Call Parcel in performance of the $600,000 Plan, IGC would have retained said real property under its ownership for the protection of the privacy and visual integrity of its project at the western base of Albany Hill.

47. In approximately 1971, Call allowed the erection by the Albany Lions Club on the Call Parcel of a metal and glass cross, of approximately fifteen to twenty feet in height. Said cross remained on said property through the trial of the subject litigation. An electrical permit was issued to the Albany Lions Club when the cross was erected, and the cross was constructed so that it could be illuminated by the Albany Lions Club.

48. When Ruth and Hubert Call contracted with IGC for the sale of the Call parcel, there existed no express easement on the Call Parcel concerning or relating to the aforementioned cross, and the written agreement between Ruth and Hubert Call and IGC, dated June 25, 1973, was silent concerning the cross.

49. Shortly before the close of the aforementioned escrow, Call insisted that the Call Parcel be burdened with an easement for the maintenance of the cross, and IGC offered no objection. By Grant Deed dated August 17, 1973, recorded on or about August 24, 1973, Ruth and Hubert Call granted to the Albany Lions Club, and to Lions International, "an easement for ingress and egress to maintain the existing cross standing on a portion" of the Call Parcel.

50. When the City accepted the deed to the Call Parcel from Cebert on August 21, 1973, by Council Resolution No. 73-76, and when the City took title to said parcel by recordation of the Grant Deed on or about August 24, 1973, the aforementioned cross was upon the Call Parcel.

51. The act of the City in accepting the deed to the Call Parcel had a secular purpose—the City accepted the Call Parcel for use by the public as a park.

52. IGC, IAC, IGD and Cebert breached no duties owed to the City of Albany, complied with all conditions imposed upon it by the City of Albany, and performed all obligations owed by it to the City of Albany, in the issues raised by the pleadings in the subject litigation.

53. No defendant in the subject litigation was involved in a conspiracy to defraud the City, to breach any fiduciary duties owed to the City, to cause a violation of Government Code § 1090, or to cause an illegal expenditure of public funds.

54. No defendant in the subject litigation was guilty of perpetrating a fraud, actual or constructive, on the City.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the Court makes the following conclusions of law:

1. Plaintiffs, and each of them, had at the commencement of this action, standing to bring said action, and complied with all requirements and prerequisites for the bringing of said action. Plaintiffs, and each of them, were therefore authorized by law to commence said action for the benefit of the City of Albany.

2. With respect to the $600,000 Plan, and the satisfaction of its obligations thereunder, IGC was neither the agent nor the trustee of the City of Albany.

3. Call's financial interest in the agreement as set forth in Finding of Fact No. 44 between IGC and the City was an

interest proscribed by Cal. Gov. Code § 1090, which provides that "City officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

4. Ruth and Hubert Call sold the Call Parcel to the City of Albany through Cebert as a conduit, but the use of a conduit creates no difference in substance and very little difference in form from a direct sale, and both methods of conveyance are proscribed by Gov. Code § 1090.

5. Because of the proscribed financial interest of Call in the agreement between IGC and the City, pursuant to which Ruth and Hubert Call received $258,000 for the Call Parcel, and because the Call Parcel was owned by Ruth and Hubert jointly, and sold and conveyed by them jointly, Ruth and Hubert Call are indebted to the City in the full amount received by them in the performance of the agreement, which amount is $258,000. Furthermore, because said liability is for a liquidated amount, received by Ruth and Hubert Call pursuant to specific action of the City on a specific date, Ruth and Hubert Call are liable to the City for interest on the $258,000 at the rate of 7% per annum from August 21, 1973 until paid in full. Finally, because the agreement under which Ruth and Hubert Call received the aformentioned monies was prohibited by statute, specifically Gov. Code § 1090, Ruth and Hubert Call are not entitled to a return of their property given in consideration for said agreement, and title to the Call Parcel remains and shall remain in the City of Albany.

6. Councilmen Howell, Carlevaro and Hein exercised bad judgment in their consideration and acceptance of the $600,000 Plan in November, 1972, but no liability to the City arose thereby.

7. Councilmen Howell and Carlevaro are not liable to the City in any amount or at all for their acceptance of the grant deeds from Cebert and in their ratification of the real property purchases made pursuant to said $600,000 Plan, because of the terms of the $600,000 Plan, and the discretion vested in IGC

thereby. Said councilmen could not have failed to so accept and ratify.

8. The Use Permit issued by the City of Albany to IGC on November 13, 1972 was issued in conformance with all laws of the City of Albany, the County of Alameda, and the State of California, and was and has been, at all times since its issuance, a valid and proper use permit.

9. The issuance of a building permit in the City of Albany is a ministerial act, provided the applicant has complied with any and all conditions placed on such issuance by the City of Albany, and has paid all necessary fees.

10. The building permit issued to IAC in August of 1973 was issued in conformance with all laws of the City of Albany, the County of Alameda, and the State of California, and was and has been, at all times since its issuance, a valid and proper building permit.

11. No alleged failure of IGC, IGD or IAC to perform properly and fully any obligations owed by any of them to the City of Albany under the $600,000 Plan, nor any alleged or purported breach by any of them of any such obligation, affects the validity of either the use permit or the building permit issued by the City of Albany.

12. IGC, IAC, IGD and Cebert breached no duties to the City in the matters raised by the pleadings in the subject litigation, and are not liable to the City in any sum, or at all.

13. The primary effect of the acceptance of the Call Parcel by the City—the addition of 1.1 acres of land to the City's park system—neither advanced nor inhibited religion; rather, the primary effect was to provide additional park land to the City and had negligible, if any, effect on any religious freedom.

14. The acceptance of the Call Parcel by the City did not constitute excessive governmental entanglement with religion.

15. The acceptance by the City of real property encumbered by an easement for ingress egress for the maintenance of a cross did not constitute action in violation of the First Amendment to the United States Constitution or any law, statutory or decisional.

Let judgement be entered accordingly.

Dated: May 2, 1978.

ROBERT H. KRONINGER
Judge of the Superior Court